CASE NBR: [92101113] CFX STATUS: [DECIDED]
SHORT TITLE: [McKnight, Gary]
VERSUS [GMC] DATE DOCKETED: [122892]
PAGE: [01]

	DATE	NOTE	PROCEEDINGS & ORDERS
1	Dec 28 1992	G	Petition for writ of certiorari filed.
2	Jan 27 1993		Waiver of right of respondent General Motors Corp. to respond filed.
3	Feb 3 1993		DISTRIBUTED. February 19, 1993
4	Feb 9 1993	P	Response requested -- JPS. (Due March 9, 1993)
5	Mar 8 1993		Brief of respondent General Motors Corporation in opposition filed.
6	Mar 10 1993		REDISTRIBUTED. March 26, 1993
7	Mar 24 1993		Record requested -- AS.
8	Apr 7 1993		REDISTRIBUTED. April 23, 1993
9	Apr 29 1993		Record filed.
		*	Proceedings from USCA/7 and USDC, Eastern District of Wisconsin (2 boxes)
10	May 5 1993		REDISTRIBUTED. May 21, 1993
11	Apr 18 1994		REDISTRIBUTED. April 22, 1994 (Page 15)

*** Related Case - Use VIDE,LS with HF ***

No. 92-1113

In The

Supreme Court of the United States

October Term, 1992

GARY M. MCKNIGHT,

Petitioner,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 102 of the Civil Rights Act of 1991, which Congress did not expressly provide should only apply prospectively, applies to cases pending at the time of its enactment?

2. Whether Petitioner's attorney was properly sanctioned for filing an appeal to preserve the Petitioner's right to petition this Court on the issue of the applicability to cases pending at the time of the enactment of Section 102 of the Civil Rights Act of 1991?

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TABLE OF AUTHORITIES

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Gary M. McKnight, respectfully prays that a *writ of certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 30, 1992.

DECISION BEFORE THE COURT OF APPEALS

The Court of Appeals summarily granted Respondent's Motion to dismiss the Appeal and to Sanction

Petitioner's attorney. A copy of its decision appears in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 30, 1992, and this petition for *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

As a result of the enactment of Section 102 of the Civil Rights Act of 1991, 42 U.S.C. Section 1981 reads as follows:

" . . . (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) for purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

STATEMENT OF THE CASE

Petitioner filed a motion in District Court pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure for relief from the operation of the judgment denying his claims under 42 U.S.C. 1981 for compensatory and punitive damages on the basis that the enactment of the Civil Rights Act of 1991 applied to pending cases and that his case was on appeal in the Seventh Circuit Court of Appeals. The District Court initially granted the motion and reinstated the jury's verdict in Plaintiff's favor. (App. 3) Before the time for Respondent's appeal had run, however, the Seventh Circuit ruled in *Mozee v. American Commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992; Cudahy, J., dissenting.), cert. den., ___ U.S. ___, 61 L.W. 3261 (October 5, 1992) that the Civil Rights Act of 1991 did not apply to pending cases. On the basis of *Mozee*, the District Court reversed itself. (App. 16) After Petitioner filed his appeal, the Seventh Circuit decided *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225 (7th Cir. 1992). Respondent then informed Petitioner that it would seek sanctions if he refused to withdraw his appeal. Upon his refusal, Respondent moved to dismiss the appeal and for the imposition of sanctions. On September 30, 1992, in an unpublished order, the Seventh Circuit granted both motions. (App. 1)

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT ON THE RETROACTIVE APPLICATION OF THE CIVIL RIGHTS ACT OF 1991.

The question whether Section 102 and other Sections of the Civil Rights Act of 1991 apply retroactively has divided Courts of Appeal and District Courts. The Seventh Circuit in *Mozee* and *Luddington* cert. denied, ___ U.S. ___, 61 L.W. 3261 (October 5, 1992), the District of Columbia circuit in *Germans v. Group Health Association Inc.*, 975 F.2d 886 (D.C. Cir. 1992; Wald, J. dissenting.), the Fifth Circuit in *Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363 (5th Cir., 1992), the Sixth Circuit in *Vogel v. Cincinnati*, 959 F.2d 594 (6th Cir. 1992), and the Eighth Circuit in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992; Heaney, J., dissenting) have ruled the Act does not apply to pending cases and pre-enactment conduct. The Ninth Circuit in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992) has ruled the Act does apply to pending cases and pre-enactment conduct not barred by the applicable statutes of limitations.

In those Circuits in which the Court of Appeals has not yet spoken, there is a similar, if not greater, variety of holdings and approaches than those reflected in the opinions in the Courts of Appeals. Thus, for example, in the Second and Eleventh Circuits, District Courts have differed whether the Civil Rights Act of 1991 should be applied retroactively. Compare *Sava v. General Electric Co.*, 789 F.Supp. 78 (D. Conn. 1992 – not retroactive) with *Strut v. International Business Machines Corp.*, ___ F.Supp.

___ (S.D.N.Y 1992 - retroactive) and *Doe v. Board of County Commissioners, Palm Beach County, Florida*, ___ F.Supp. ___ (S.D. Fla. 1992 – not retroactive) with *Assily v. Tampa General Hospital*, 791 F.Supp. 862 (M.D. Fla. 1991 – retroactive). Clearly, then, on the important question of the retroactivity of Civil Rights Act of 1991, there is a compelling need for an authoritive and definitive decision by this Court.

II. SANCTIONS TO PENALIZE AN APPEAL DESIGNED TO PRESERVE THE OPPORTUNITY TO SEEK THIS COURT'S REVIEW UNNECESSARILY MAKE ACCESS TO THIS COURT MORE DIFFICULT.

The Seventh Circuit imposed sanctions on Petitioner's attorney because Petitioner appealed the district Court's decision dismissing his suit. (Appendix) Originally, the District Court had ruled in Petitioner's favor. (Appendix) On the basis of the Seventh Circuit decision in *Mozee*, the District Court reversed itself.

While Petitioner's appeal was pending, the Seventh Circuit decided *Luddington*. On the basis of these two decisions, Respondent informed Petitioner it would seek sanctions if the Petitioner refused to withdraw his appeal. When Petitioner refused, the Seventh Circuit sanctioned his attorney under Rule 38 of the Appellate Rules of Civil Procedure.

At the time the appeal was pending, the Sixth and Eighth Circuits as well as the Seventh Circuit had ruled that the Civil Rights Act of 1991 was prospective only. No other Circuit had ruled on this issue; but several District

Courts in other circuits had ruled the Act should be retroactive.

Since the only way Petitioner could preserve his right to seek this Court's review of the unsettled but important issue of the retroactivity of Section 102 of the Civil Rights Act of 1991 was by pursuing his appeal, he pursued it. He did so even though he had no reasonable expectation that his appeal would be successful in the Seventh Circuit.

This Court has rejected an effort by a federal agency to create a barrier to access to this Court. *Auto Workers Local 283 (Wisconsin Motor Corp.) v. Scofield*, 382 U.S. 205 (1965). It should also reject the use of Rule 38 of the Appellate Rules of Civil Procedure to create such a barrier.

CONCLUSION

For these reasons, a *writ of certiorari* should issue to review the judgment of the Seventh Circuit.

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Dated this 22 day of December, 1992.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

September 30, 1992

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. HARLINGTON WOOD, Jr., *Senior Circuit Judge*

GARY MCKNIGHT, Plaintiff-Appellant, v. GENERAL MOTORS CORPORATION, Defendant-Appellee.	Appeals from the United States District Court for the Eastern District of Wisconsin. No. 87 C 248 Myron L. Gordon, Judge.
Nos. 92-2580 and 92-2604	

This matter comes before the court for its consideration of the following documents:

1. **MOTION TO DISMISS APPEALS AND REQUEST FOR SANCTIONS** filed herein on July 21, 1992, by counsel for the appellee.

2. **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEALS AND REQUEST FOR SANCTIONS** filed herein on July 21, 1992, by counsel for the appellee.

3. **MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEALS AND REQUEST FOR SANCTIONS** filed herein on August 3, 1992, by counsel for the appellant.

On July 22, 1992, pursuant to Federal Rule of Appellate Procedure 38 and Circuit Rule 38, we ordered the plaintiff-appellant to respond to the allegations contained in the defendant-appellee's MOTION TO DISMISS APPEALS AND REQUEST FOR SANCTIONS. The plaintiff-appellant's response does not dissuade us from awarding Rule 38 sanctions in this instance.

Accordingly,

IT IS ORDERED that said motion is **GRANTED**, the appeal is **DISMISSED**, and sanctions are awarded in the amount of $500.00, to be taxed against attorney John S. Williamson, Jr. Mr. Williamson must pay the sanctions within 30 days of the date of this order by check made payable to the Clerk of the United States Court of Appeals for the Seventh Circuit. Counsel shall tender this check to the clerk by no later than October 30, 1993.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Gary McKnight,
Plaintiff,
v. Case No. 87-C-248
General Motors Corporation,
Defendant.

DECISION AND ORDER
(Filed Apr. 22, 1992)

In 1988, Gary McKnight prevailed at trial on his claim that he was unlawfully discharged by the defendant, General Motors Corporation, because of his race and in retaliation for his prior complaints of race discrimination. Mr. McKnight's claims were predicated upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981.

The § 1981 claim was tried to a jury, and the court resolved the Title VII claim. The jury returned a verdict in favor of the plaintiff on both the discrimination claim and the retaliation claim under § 1981 and awarded damages of $55,000.00 for back pay, another $55,000.00 for emotional distress, and 500,000.00 as punitive damages. On October 14, 1988, judgment was entered in the plaintiff's favor in the amount of $610,000.00, plus attorney's fees.

This court denied Mr. McKnight's post-trial motion which sought reinstatement to his former position as a manufacturing supervisor and his alternative request of

reinstatement to a different job within General Motors Corp. and also denied General Motors' motions which sought a judgment notwithstanding the verdict, an order amending the judgment or a new trial. McKnight v. General Motors Corp., 705 F. Supp. 464 (E.D. Wis. 1989). The defendant appealed from the judgment except for the award of attorney's fees, and the plaintiff appealed from the portion of the judgment which denied reinstatement.

On appeal, the court of appeals for the seventh circuit vacated and remanded the action to this court with direction to dismiss Mr. McKnight's § 1981 claims in light of the United States Supreme Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164, 176 (1989), which had been decided on June 15, 1989, during the pendency of the appeal. In *Patterson*, the Supreme Court held that § 1981 was limited to providing redress for unlawful discrimination in the "making and enforcement of private contracts" and that § 1981 provided no relief from "problems that may arise later from the conditions of continuing employment." McKnight v. General Motors Corp., 908 F.2d 104, 117 (7th Cir. 1990), *cert. denied* ___ U.S. ___ (1991). In addition, to directing this court to dismiss the § 1981 claims, the court of appeals remanded the action "for reconsideration of [Mr. McKnight's] entitlement to reinstatement (or in lieu thereof to front pay) under Title VII." *McKnight*, 908 F.2d at 117.

On remand, this court dismissed Mr. McKnight's § 1981 claims in accordance with the court of appeals' direction. Also, this court again denied Mr. McKnight's claim for reinstatement to a position within General Motors Corporation and denied his request for front pay in lieu of reinstatement under Title VII. *See* McKnight v.

General Motors Corp., 768 F. Supp. 675, 681 (E.D. Wis. 1991).

Mr. McKnight then filed a motion for reconsideration of the court's decision and order on remand. On August 13, 1991, the motion was denied in an unpublished decision and order, and the judgment on remand was entered. Mr. McKnight then filed a notice of appeal from the judgment on remand; specifically, Mr. McKnight appealed form this court's decisions regarding the scope of reconsideration upon remand, the denial of McKnight's request for reinstatement, the denial of Mr. McKnight's front pay in lieu of reinstatement, the denial of award of any additional attorney's fees, and the decision not to pay Mr. McKnight post-judgment interest at the rate of 15% or prejudgment interest in general.

Mr. McKnight did *not* appeal from the portion of the judgment on remand which dismissed his § 1981 claims. In light of the Supreme Court's recent opinion in *Patterson*, Mr. McKnight may have chosen not to appeal from the portion of the judgment dismissing his § 1981 claims because to do so may have exposed him to the imposition of sanctions. *See* Rule 38, Federal Rules of Appellate Procedure (allows the court of appeals to award "just damages and single or double costs to the appellee" where an appeal is frivolous).

On November 6, 1991, Mr. McKnight filed with the court of appeals for the seventh circuit a motion for leave to amend his notice of appeal to include an appeal from the portion of the judgment on remand which dismissed his § 1981 claims. As a basis for the motion, Mr. McKnight cited the pendency of legislation which, if enacted, would

alter the scope of § 1981. During the pendency of this appeal (which is still pending) and the pendency of Mr. McKnight's motion, Congress enacted and the President signed into law the Civil Rights Act of 1991.

On November 26, 1991, the court of appeals denied Mr. McKnight's request to amend his notice of appeal; the basis for the denial of the motion was that Mr. McKnight's "notice of appeal . . . did not mention his intention to appeal the dismissal of his § 1981 claims" and therefore, the court of appeals lacked jurisdiction to consider his request. McKnight v. General Motors Corporation, Nos. 91-2989 and 91-2990 (7th Cir. Nov. 26, 1991) (unpublished order).

Presently before this court is Mr. McKnight's motion which requests that this court "reconsider its interlocutory order dismissing his claims under 42 U.S.C. § 1981, . . . or, in the alternative, for an order, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, to reopen the final order dismissing his claims under 42 U.S.C. § 1981." In response to Mr. McKnight's motion, the court ordered additional briefing on the following two issues: (1) the merits of Mr. McKnight's motion (including the issue of the retroactivity of the Civil Rights Act of 1991); and (2) this court's jurisdiction to address Mr. McKnight's motion in light of the pending appeals. Upon review of the parties' submissions, the court finds that it has jurisdiction and will grant Mr. McKnight's motion.

I.

As a preliminary matter, Mr. McKnight's request, that the court reconsider its "interlocutory order dismissing

his claims under 42 U.S.C. § 1981," is inappropriate insofar as that order was reduced to a final judgment on August 13, 1991. Thus, Mr. McKnight's only avenue for relief is Rule 60(b), Federal Rules of Civil Procedure, which allows relief from *final* judgments or orders in a narrow set of circumstances.

In support of his motion for relief under Rule 60(b), Mr. McKnight asserts that a subsequent change in the law – the enactment of the Civil Rights Act of 1991 – validates his dismissed § 1981 claims and, therefore, justifies reinstatement of the original October 14, 1988, judgment as it relates to his § 1981 claims. In response, General Motors contends that the plaintiff's deliberate choice not to appeal from the portion of the judgment dismissing his § 1981 claims precludes this court from granting alternative relief through Rule 60(b). In addition, General Motors asserts that Mr. McKnight's motion should be denied on two other grounds: (1) that a subsequent change in the law is not a basis for reopening a final judgment under Rule 60(b); and (2) that the Civil Rights Act of 1991 does not apply retroactively.

II.

In general, "the filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control *over those aspects of the case involved in the appeal.*" Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (emphasis added); *see also* Chicago Downs Association, Inc. v. Chase, 944 F.2d 366, 370 (7th Cir. 1991) (once a notice of appeal is filed,

the district court is divested of jurisdiction over the case *as to the issues on appeal*)

Here, Mr. McKnight filed a notice of appeal from the portions of the judgment on remand relating to his Title VII claim, but did not appeal from the portion of the judgment relating to his § 1981 claims. Since this court was divested of jurisdiction only as to the causes of action appealed from – those relating to Title VII – it retains jurisdiction over all issues relating to the § 1981 claims.

Indeed, the stated rationale of the court of appeals' order denying Mr. McKnight's motion to amend his appeal supports this conclusion: the court determined that *it* lacked jurisdiction over Mr. McKnight's § 1981 claims. *See* McKnight v. General Motors Corp., Nos. 91-2989 and 91-2990 (7th Cir. Nov. 26, 1991) (notice of appeal defines the court's jurisdiction). It follows then that jurisdiction must exist somewhere – if not in the court of appeals, then in this court.

Further, because the resolution of Mr. McKnight's motion does not affect the claims currently pending before the court of appeals, a remand of the now-pending appeal is not required in the event that this court were to grant Mr. McKnight's instant motion. *See* Textile Banking Company, Inc. v. Rentschler, 657 F.2d 844, 849 (1981) (where an appeal from the *entire* judgment was pending a remand of the entire action is required if the district court is persuaded to grant the Rule 60(b) motion). Accordingly, I conclude that this court has jurisdiction to consider the merits of Mr. McKnight's present motion.

III.

Rule 60(b), Federal Rules of Civil Procedure allows a court to relieve a party from a final judgment or order in a narrow set of circumstances. Because of the interest in the finality of judgments, the court will grant a Rule 60(b) motion only upon a showing of exceptional circumstances. *See* McKnight v. United States Steel Corp., 726 F.2d 333, 335 (7th Cir. 1984); De Fillippis v. United States, 567 F. 2d 341, 342 (7th Cir. 1977), *overruled on other grounds by* United States v. Chicago, 663 F.2d 1354 (7th Cir. 1981). Mr. McKnight relies upon Rule 60(b)(6) which allows a party to be relieved from a final judgment or order for "any other reason justifying relief from the operation of the judgment."

In order for Mr. McKnight to be granted the extraordinary relief he seeks, he must demonstrate (1) that a subsequent change in the law amounts to a "reason justifying relief from the operation of the judgment" under Rule 60(b)(6), *and* (2) that the Civil Rights Act of 1991 should be applied retroactively.

A.

Before addressing the retroactivity issue, the court must determine whether a subsequent change in the law, in general, comes within Rule 60(b)(6). The court of appeals for the seventh circuit has concluded that a subsequent change in the law after the entry of judgment is generally insufficient as "any other reason" justifying relief from the judgment under Rule 60(b)(6). *See* Parke-Chapley Construction Co. v. Cherrington, 865 F.2d 907, 915 (7th Cir. 1989); *see also United States Steel Corp.*, 726

F.2d at 336 (court affirmed judgment of district court which denied plaintiff's Rule 60(b) motion on the ground that a change in the applicable law after entry of judgment does not, by itself, justify relief under Rule 60(b)).

I believe that the circumstances in this action permit the relief contemplated by Rule 60(b). Here, a judgment for $610,000.000 was originally entered in favor of Mr. McKnight on his § 1981 claims. However, the award was ultimately vacated and the § 1981 claims dismissed on remand based on the Supreme Court's decision, during the pendency of the appeal from the original judgment, in *Patterson*. Moreover, during the pendency of the appeal from the portion of the judgment on remand relating to Mr. McKnight's Title VII claims, the enactment of the Civil Rights Act of 1991 overturned the effect of *Patterson*. Thus, if the 1991 act were applied retroactively, the only judicial intervention required would be the reinstatement of the jury verdict in favor of Mr. McKnight on his § 1981 claims. Mr. McKnight has demonstrated that the enactment of the Civil Rights Act of 1991 along with the exceptional circumstances of this case constitute "a reason justifying relief from the operation of the judgment" under Rule 60(b)(6).

B.

The federal courts are divided on the issue of the retroactive application of the Civil Rights Act of 1991. Numerous district courts, including several branches of this court, have confronted the issue and have arrived at opposite conclusions. *See* Gillespie v. Norwest Corp., Nos. 85-C-1318 and 85-C-1393 (E.D. Wis. Feb. 14, 1992)

(Stadtmueller, J.) (the 1991 act is to be applied retroactively to pending claims); McKnight v. Merrill Lynch, No. 90-C-597 (E.D. Wis. Jan. 9, 1992) (Curran, J.) (act is not to be applied to cases pending before enactment of the act); Saltarikos v. Charter Manufacturing Co., Inc., ___F. Supp. ___ (Evans, C.J.) (E.D. Wis. 1992) (the 1991 act is to be applied retroactively to pending claims because it was enacted to restore § 1981 to its meaning prior to *Patterson*); *see also* Stender v. Lucky Stores, Inc. 780 F. Supp. 1302 (N.D. Cal. 1992) (Patel, J.) (plain language of the statute and legislative history support retroactive application of the act); Bristow v. Drake Street, Inc., ___F. Supp. ___ (N.D. Ill. 1992) (citing Bradley v. Richmond School Board, 416 U.S. 696 (1974), in concluding that the act is to be applied retroactively; Mojica v. Gannett Co., 779 F. Supp. 94 (N.D. Ill. 1991) (same); Van Meter v. Barr, 778 F. Supp. 83 (D.D.C. 1991) (Gesell, J.) (citing Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) in determining that the 1991 act should be applied prospectively only); Hansel v. Public Service Co. of Colorado, 778 F. Supp. 1126 (D. Colo. 1991) (Babcock, J.) (same).

To date, two circuit courts of appeals have addressed the issue of retroactivity of the Civil Rights Act of 1991, and each has determined that the act does not apply to conduct that occurred prior to the date of the enactment of the act. *See* Fray v. The Omaha World Herald Co., ___ F.2d ___ (8th Cir. 1992); Vogel v. City of Cincinnati, ___ F.2d ___ (6th Cir. 1992). In *Fray*, a divided panel of the court of appeals for the eighth circuit ruled that Congress' intent that the act was to be applied prospectively only was evidenced by the fact that the original bill, which contained an explicit retroactivity provision,

was vetoed by the President and a compromise bill, which eventually became the Civil Rights Act of 1991, omitted those provisions when enacted.

In *Vogel*, a divided panel of the court of appeals for the sixth circuit cited three grounds for its conclusion that the act was to be applied prospectively only: (1) the absence of clear legislative intent that the act was to be applied retroactively; (2) the Equal Employment Opportunity Commission's decision not to apply the act to events occurring before the enactment of the act was reasonable; and (3) retroactive application of the act would affect substantive rights and liabilities of the parties. *See*, ___ F.2d at ___.

While the court of appeals for the seventh circuit has not yet addressed this specific issue, it has enunciated the standard to be applied in general in determining whether a statute is to be applied retroactively. *See* Federal Deposit Insurance Corp. v. Wright, 942 F.2d 1089 (7th Cir. 1991); *see also Mojica*, 779 F. Supp. at 96.

In *Wright*, the court concluded that the test to be applied is that identified by the United States Supreme court in Bradley v. Richmond School Board, 416 U.S. 696, 711 (1974) (courts are to apply the law in effect at the time it renders its decision, unless doing so would result in "manifest injustice" or there is statutory direction or legislative history to the contrary). *See*, 942 F. 2d at 1095 n. 6. In my opinion, the 1991 act is applicable to the instant case (which was pending during the enactment of the act) unless there is a clearly expressed congressional intent to the contrary or manifest injustice would result to General Motors if the act were applied retroactively.

After a review of the legislative history and the language of the statute, I conclude that neither the statutory language nor the legislative history of the 1991 act provide a clearly expressed congressional intent against applying the act retroactively. *See Bristrow*, ___ F. Supp at ___ (plain language of the statute and legislative history do not fairly indicate that the statute is to be applied prospectively only); *Stender*, 780 F. Supp. at 1304-05 (plain language of statute and legislative history support retroactive application of the 1991 act); *Mojika* [sic], 779 F. Supp. at 97 (plain language of the statute and legislative history of the statute do not fairly indicate that the statute is to be applied prospectively only).

In determining whether retroactive application of the act would result in a "manifest injustice," three factors are to be considered: (1) the nature and identity of the parties; (2) the nature of the rights affected; and (3) the impact of the change in the law on pre-existing rights. *See Wright*, 942 F.2d at 1096 (quoting In re Busick, 831 F.2d 745, 748 (7th Cir. 1987)).

Applied to the case at hand, the three factors weigh against a finding of manifest injustice to General Motors. Although the action is one between private parties, it is apparent that the applicable legislation affects civil rights and involves matters of public concern. *See Wright*, 942 F.2d at 1096; *Bristow*, ___ F. Supp at ___; *Mojica*, 779 F.2d at 98.

Since the Civil Rights Act of 1991 was intended to restore § 1981 to its pre-*Patterson* meaning (which was in place when the jury originally awarded Mr. McKnight $610,000.00 on his § 1981 claims) and augmented the

rights and remedies that result from a violation of Title VII, I am satisfied that the concerns expressed in the second and third factors are not present in this case. Here, at the time that the challenged conduct of General Motors began, the controlling law was consistent with the 1991 act's amendments. Thus, the change in the law did *not* affect the rights and obligations of the parties.

In addition, because the law was already clear at the time of challenged conduct that such conduct was prohibited, new and unanticipated obligations are not imposed upon General Motors by applying the 1991 act retroactively.

Based on the foregoing, I find that the retroactive application of the act will not result in a manifest injustice to General Motors such that the presumption of retroactivity expressed in *Bradley and Wright* should be defeated. Because I have concluded that the Civil Rights Act of 1991 is to be applied retroactively, it follows that Mr. McKnight's Rule 60(b)(6) motion seeking relief from the August 13, 1991, judgment dismissing his § 1981 claims should be granted.

Therefore IT IS ORDERED that Mr. McKnight's Rule 60(b)(6) motion be and hereby is granted.

IT IS ALSO ORDERED that the portion of the August 13, 1991, judgment on remand dismissing Mr. McKnight's § 1981 claims be and hereby is vacated.

IT IS FURTHER ORDERED that the portion of the October 14, 1988, judgment awarding Mr. McKnight $610,000.00 on his § 1981 claims be and hereby is reinstated.

IT IS FURTHER ORDERED that the clerk of court be and hereby is directed to amend the August 13, 1991 judgment on remand to reflect the reinstatement of Mr. McKnight's § 1981 claims and his award of $610,000.00.

Dated at Milwaukee, Wisconsin, this 22nd day of April, 1992.

/s/ Myron L. Gordon
Senior U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Gary McKnight,
Plaintiff,
v. Case No. 87-C-248
General Motors Corporation,
Defendant.

DECISION AND ORDER
(Filed June 2, 1992)

In 1988, Gary McKnight prevailed on his claim that he was unlawfully discharged by the defendant, General Motors Corporation, because of his race and in retaliation for his prior complaints of race discrimination. Mr. McKnight's claims were predicated upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981.

The § 1981 claim was tried to a jury, and the court resolved the Title VII claim. The jury returned a verdict in favor of the plaintiff on both the discrimination claim and the retaliation claim under § 1981 and awarded both compensatory and punitive damages. On October 14, 1988, judgment was entered in the plaintiff's favor in the amount of $610,000.00, plus attorney's fees.

This court denied Mr. McKnight's post-trial motion requesting reinstatement and also denied General Motors' motions which sought a judgment notwithstanding the verdict, an order amending the judgment or a new

trial. McKnight v. General Motors Corp., 705 F. Supp. 464 (E.D. Wis. 1989). The defendant appealed from the judgment except for the award of attorney's fees, and the plaintiff appealed from the portion of the judgment which denied reinstatement.

On appeal, the court of appeals for the seventh circuit vacated the judgment and remanded the action to this court with direction to dismiss Mr. McKnight's § 1981 claims in light of the United States Supreme Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164, 176 (1989) which had been decided on June 15, 1989 during the pendency of the appeal. In addition to directing this court to dismiss the § 1981 claims, the court of appeals remanded the action "for reconsideration of [Mr. McKnight's] entitlement to reinstatement (or in lieu thereof to front pay) under Title VII." *McKnight*, 908 F.2d at 117.

On remand, this court dismissed Mr. McKnight's § 1981 claims in accordance with the court of appeals' direction. Also, this court again denied Mr. McKnight's claim for reinstatement to a position within General Motors Corporation and denied his request for front pay in lieu of reinstatement under Title VII. *See* McKnight v. General Motors Corp., 768 F. Supp. 675, 681 (E.D. Wis. 1991).

Mr. McKnight then filed a motion for reconsideration of the court's decision and order on remand. On August 13, 1991, the motion was denied in an unpublished decision and order, and the judgment on remand was entered. Mr. McKnight then filed a notice of appeal from the judgment on remand; however Mr. McKnight did not

appeal from the portion of the judgment on remand which dismissed his § 1981 claims.

On November 6, 1991, Mr. McKnight filed with the court of appeals a motion for leave to amend his notice of appeal to include an appeal from the portion of the judgment on remand which dismissed his § 1981 claims. As a basis for the motion, Mr. McKnight cited the pendency of legislation which, if enacted, would alter the scope of § 1981. During the pendency of this appeal (which is still pending) and the pendency of Mr. McKnight's motion, Congress enacted and the president signed into law, the Civil Rights Act of 1991.

On November 26, 1991, the court of appeals denied Mr. McKnight's request to amend his notice of appeal. McKnight v. General Motors Corporation, Nos. 91-2989 and 91-2990 (7th Cir. Nov. 26, 1991) (unpublished order). Mr. McKnight then filed a motion with this court which requested reconsideration of "its interlocutory order dismissing his claims under 42 U.S.C. § 1981, . . . or, in the alternative, . . . an order, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, to reopen the final order dismissing his claims under 42 U.S.C. § 1981."

After determining that this court had jurisdiction to consider Mr. McKnight's request, I granted his motion and ordered that the portion of the August 13, 1991, judgment on remand dismissing his § 1981 claims be vacated; in addition, I reinstated the portion of the October 14, 1988, judgment which awarded Mr. McKnight $610,000.00 on his § 1981 claims. *See* McKnight v. General Motors Corporation, ___ F. Supp. ___ (E.D. Wis. 1992). My decision to grant Mr. McKnight's motion was premised

on my determination that the Civil Rights Act of 1991 applied retroactively and therefore, violated his dismissed § 1981 claims. On April 28, 1992, an amended judgment on remand was entered in accordance with the decision and order of April 22, 1992.

At the time of the issuance of the April 22, 1992, decision and order and the entry of the amended judgment on remand, neither the United States Supreme Court nor the court of appeals for the seventh circuit had addressed the issue of the retroactivity of the Civil Rights Act of 1991. However, on May 7, 1992, the court of appeals for the seventh circuit decided Mozee v. American Commercial Marine Service Company, ___ F.2d ___ (7th Cir. 1992), in which it held, that the Civil Rights Act of 1991 does *not* apply retroactively to cases pending on appeal or to cases remanded to the district court.

By motion of May 15, 1992, General Motors requested that I vacate the April 28, 1992, amended judgment on remand pursuant to Rule 60(b), Federal Rules of Civil Procedure, insofar as the April 22, 1992, decision and order, upon which the amended judgment on remand was based, was inconsistent with the rationale in *Mozee*. General Motors also requested expedited consideration of its motion because its deadline to file a notice of appeal from the judgment on remand was May 28, 1992. I granted General Motors' application for expedited consideration and invited the parties to submit briefs on this issue in accordance with an expedited briefing schedule; upon review of the parties' submissions, General Motors' motion will be granted.

While the defendant does not specify under which subsection of Rule 60(b) its present motion is brought, the court assumes it is brought pursuant to Rule 60(b)(6), which allows the court to relieve a party from a final judgment for "any . . . reason justifying relief from the operation of the judgment." That is, the defendant argues that the intervening decision by the court of appeals that the Civil Rights Act of 1991 should not be applied retroactively justifies relief from the April 28, 1992, amended judgment on remand.

A decision of a United States circuit court is binding precedent on the district courts located within that circuit. *See* United States Ex Rel. Shore v. O'Leary, 833 F.2d 663, 667 (7th Cir. 1987); Olson v. Paine, Webber, Jackson & Curtis, Inc., 806 F.2d 731, 741 (7th Cir. 1986). Thus, I am obligated to apply the decision of the court of appeals that the Civil Rights Act of 1991 is meant to have prospective application only.

Because my decision underlying the amended judgment on remand – that the Civil Rights Act of 1991 is to be applied retroactively – is contrary to the decision of the court of appeals in *Mozee*, I believe that General Motors should be relieved from the operation of the April 28, 1992, amended judgment on remand. Moreover, Mr. McKnight has failed to identify a satisfactory justification which relieves me from my duty to apply the ruling of the court of appeals – which is now the law of the circuit – to the instant action.

Therefore, IT IS ORDERED that General Motors' motion to vacate the amended judgment on remand dated April 28, 1992, be and hereby is granted.

IT IS ALSO ORDERED that the August 13, 1991, judgment on remand be and hereby is reinstated in its entirety.

Dated at Milwaukee, Wisconsin, this 2nd day of June, 1992.

/s/ Myron L. Gordon
Senior U.S. District Judge

No. 92-1113

IN THE

Supreme Court of the United States

October Term, 1992

GARY M. McKNIGHT,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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March 8, 1993

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review the court of appeals decision that Section 102 of the Civil Rights Act of 1991 does not apply to cases pending on appeal on the Act's effective date?

2. Whether this Court should review the court of appeals sanction of Petitioner's attorney for filing an appeal which he had no reason to believe would be successful?

RULE 29.1 LIST

Pursuant to Supreme Court Rule 29.1, General Motors Corporation states that it has no parent corporation. It owns an interest in the following companies which are not wholly-owned subsidiaries:

AC Bakony Kft. (Hungary)
AMBRAKE Corporation (USA)
AMRAAM International Licensing Company (USA)
American Manufacturing Systems, Inc. (USA)
Asset Leasing GmbH (West Germany)
Atlantic Satellites Ltd. (Ireland)
Aura Srl (Italy)
Banque de Credit General Motors (France)
Beijing International Information Processing Company Limited (Peoples Republic of China)
British Caledonian Flight Training Limited (England)
CAMI Automotive, Inc. (Canada)
Carus Grundstucks-Vermietungsgesellschaft GmbH & Co. Object Kuno 65 KG (West Germany)
Carus Grundstucks-Vermietungsgesellschaft GmbH & Co. Object Leo 40 KG (West Germany)
China Management Systems Corporation (China)
Comlinear Corporation (USA)
Convesco Vehicles Sales GmbH (West Germany)
DRB s.a./n.v. (Belgium)
Daewoo Automotive Components, Ltd. (Korea)
Daewoo Motor Co., Ltd. (Korea)
Delkor Battery Company, Ltd. (Korea)
Diavia SpA (Italy)
EPEC S.A. (Brazil)
Earth Observation Satellite Company (USA)
Emperion Corporation (USA)
Fabrica Colombiana de Automotores S.A. ("Colomotores") (Columbia)

Federal Computer Services Corp. (USA)
Federal Integrated Systems Corp. (USA)
G & F Company (USA)
GM Allison Japan Limited (Japan)
G.M.A.C. Financiera de Colombia S.A. Companie de Financiamiento Comercial (Columbia)
GMFanuc Robotics Canada Ltd. (Canada)
GMFanuc Robotics Corporation (USA)
GMFanuc Robotics Europe GmbH (West Germany)
GMFanuc Robotics Italia S.r.l. (Italy)
GMFanuc Robotics (U.K.) Ltd. (England)
GMFanuc Robotique France S.A.R.L. (France)
General Motors Bankgesellschaft GmbH (Austria)
General Motors del Ecuador S.A. (Ecuador)
General Motors France Automobiles S.A. (France)
H & D Radio Frequency Identification Products (USA)
H & R Company (USA)
HBC (USA)
HKV (USA)
Hughes-Kenwood RDSS, Inc. (USA)
IBC Vehicles Limited (United Kingdom)
I.K. Coach Co., Limited (Japan)
ITC Inland Teknik Oto Yan Sanayi Sirketi (Turkey)
International Electro-Optical Industry Anonim Sirketi (Turkey)
Interpractice Systems, Inc. (USA)
Kabelwerke Reinshagen GmbH (West Germany)
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany)
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany)
Koram Plastics Company, Ltd. (Korea)
LEA GP Incorporated (USA)
Light Helicopter Turbine Engine Company (USA)
MET (USA)

Metal Casting Technology, Inc. (USA)
Millbrook Pension Management Ltd. (England)
Neodata Holdings, Inc. (USA)
New United Motor Manufacturing, Inc. (USA)
Nippon EDS Co., Ltd. (Japan)
Opel-Automobilwerk Eisenach-PKW GmbH (West Germany)
Opel-Wohnbau GmbH (West Germany)
Packard CTA Pty. Ltd. (Australia)
Packard Electric Vas kft (Hungary)
Saab Automobile AB (Sweden)
Shinsung Packard Company, Ltd. (Korea)
Societe Francaise des Amortisseurs de Carbon S.A. (France)
Sung San Company, Ltd. (Korea)
Systems Technology Management Corporation (Korea)
T.A.D. Communications Company (USA)
3DK Limited (United Kingdom)
Truck and Bus Engineering U.K. (USA)
United Australian Automotive Industries Limited (Australia)
Vanguarda Componentes Automotivas, S.A. (Brazil)
Vehicle Test Technology, Inc. (USA)

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IN THE

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On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, General Motors Corporation ("GM"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the United States Court of Appeals for the Seventh Circuit's decision in *McKnight v. General Motors Corporation*, Nos. 92-2580 and 92-2604, entered on September 30, 1992.

COUNTERSTATEMENT OF THE CASE

After GM terminated his employment in 1983, Petitioner Gary M. McKnight ("McKnight") filed this action, in which he alleged violations of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. In October 1988, a jury returned a verdict for McKnight on his § 1981 claims and, based on the jury's verdict, the district court entered judgment for McKnight on his Title VII claims. GM appealed the judgment.

While the case was pending before the Seventh Circuit, this Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164

(1989). Based on the *Patterson* holding, the Seventh Circuit reversed the portion of the district court's judgment awarding McKnight relief under § 1981. McKnight asked this Court to review the Seventh Circuit's decision, but his petition for certiorari was denied on March 18, 1991. *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-09 (7th Cir. 1990), *cert. denied,* U.S. , 111 S. Ct. 1306 (1991).

The Seventh Circuit remanded the case to the district court with instructions to dismiss McKnight's § 1981 claims and reconsider his right to reinstatement or, in lieu thereof, to front pay in connection with his Title VII claims. Pursuant to the court of appeals' mandate, the district court dismissed McKnight's § 1981 claims and renewed its denial of reinstatement and front pay. McKnight appealed the district court's judgment concerning the denial of reinstatement and front pay, but he did not appeal the dismissal of his § 1981 claims.

While the issues of McKnight's right to reinstatement or front pay were again pending on appeal before the Seventh Circuit, Congress passed the Civil Rights Act of 1991 ("the Act"). Section 102 of the Act reverses this Court's decision in *Patterson.* McKnight then moved the court of appeals for leave to amend his Notice of Appeal to include the dismissal of his § 1981 claims. The Seventh Circuit denied his request. McKnight then filed a motion in the district court under Rule 60(b)(6) of the Federal Rules of Civil Procedure, and asked the district court to apply Section 102 of the Act retroactively to revive his dismissed § 1981 claims. The district court granted McKnight's motion and reinstated the portion of the trial court's judgment granting him relief under § 1981.

Before the expiration of GM's time to appeal the amended judgment, the Seventh Circuit issued its decision in *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929 (7th Cir.), *cert. denied,* U.S. , 113 S. Ct. 207 (1992), *rehearing denied,* U.S. , 113 S. Ct. 644 (1992), that the Act did not apply to

pending cases. Based on *Mozee,* the district court reversed itself and granted GM's motion to vacate the amended judgment on the § 1981 issue. McKnight then appealed the district court's decision.

After McKnight filed his appeal, the Seventh Circuit again decided that the Act did not apply retroactively. *Luddington v. Indiana Bell Tel. Co.*, 966 F.2d 225 (7th Cir. 1992). At that time no circuit had applied any portion of the Act retroactively. GM informed McKnight that, based on the current state of the law, it considered his appeal frivolous and would move for sanctions if he did not voluntarily withdraw it. McKnight refused to withdraw his appeal. On September 30, 1992, the Seventh Circuit granted GM's motion to dismiss McKnight's appeal and imposed sanctions in the amount of $500.00 against McKnight's counsel. McKnight seeks review of that decision.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS ALREADY GRANTED CERTIORARI IN TWO OTHER CASES ON THE ISSUE OF THE ACT'S RETROACTIVITY.

On February 22, 1993, this Court agreed to review the issue of the Act's retroactivity in *Landgraf v. USI Film Products,* Case No. 92-757, and *Rivers v. Roadway Express, Inc.*, Case No. 92-938. GM believes the appropriate action in this case is to defer resolution of McKnight's petition for a writ of certiorari until after the Court addresses the retroactivity issue in *Landgraf* and *Rivers.*

II.

THE ALLEGED IMPROPER IMPOSITION OF SANCTIONS DOES NOT PRESENT A BASIS TO GRANT McKNIGHT'S PETITION.

McKnight admits that at the time he appealed to the Seventh Circuit seeking retroactive application of the Act, "he had no

reasonable expectation that his appeal would be successful." (Petition for Certiorari, p. 6). By the time GM requested McKnight to withdraw his appeal, the Seventh Circuit had issued two decisions refusing to apply substantive portions of the Act retroactively. Furthermore, the only other circuits that had addressed the issue at that time had similarly held that the Act was not to be given retroactive effect. Under these circumstances, McKnight's appeal was clearly frivolous and the Seventh Circuit's imposition of sanctions was proper.

Moreover, even if the imposition of sanctions was not proper, that is not a basis for granting certiorari in this case. Contrary to McKnight's assertions, this is not an issue with broad implications; it simply involves the imposition of sanctions by one court against one attorney. This Court should not expend its valuable time reviewing an order with such limited effect.

CONCLUSION

For all of the reasons stated above, GM respectfully requests that the Court defer resolution of McKnight's petition for a writ of certiorari on the Act's retroactivity issue and deny his petition on the sanctions issue.

Dated this 8th day of March, 1993.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

GARY M. McKNIGHT *v.* GENERAL MOTORS CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92-1113. Decided May 23, 1994

PER CURIAM.

After petitioner appealed the dismissal of his employment discrimination claim, respondent moved for dismissal of the appeal and for sanctions. Respondent argued that the appeal was frivolous in light of controlling decisions of the Court of Appeals for the Seventh Circuit holding that §101 of the Civil Rights Act of 1991, 105 Stat. 1071, 42 U. S. C. §1981 (1988 ed., Supp. IV), does not apply to cases arising before its enactment. See *Luddington* v. *Indiana Bell Tel. Co.*, 966 F. 2d 225 (1992); *Mozee* v. *American Commercial Marine Serv. Co.*, 963 F. 2d 929 (1992). In an order dated September 30, 1992, the Court of Appeals granted respondent's motion, dismissed the appeal, and imposed a $500 sanction on petitioner's attorney.

The Court of Appeals correctly rejected petitioner's argument that §101 applies retroactively. See *Landgraf* v. *USI Film Products*, 511 U. S. ___ (1994); *Rivers* v. *Roadway Express, Inc.*, 511 U. S. ___ (1994). However, if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was foreclosed by circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal and sanctions, this Court had not yet ruled on the application of §101 to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court.

Although, as of September 30, 1992, there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous. See *Mozee, supra*, at 940–941 (Cudahy, J., dissenting).

Accordingly, the petition for a writ of certiorari is granted, the order imposing sanctions is vacated, and the case is remanded for further proceedings consistent with this opinion.